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November 10, 1993

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Donna R. Searcy, Secretary
Federal Communications Commission
Washington, DC 20554

Re: In the Matter of
Implementation of Section
309(j) of the Communications
Act Competitive Bidding
PP Docket No. 93-253

Dear Ms. Searcy:

Transmitted herewith on behalf of Tri-State Radio Company is an original and four (4) copies of its "Comments of Tri-State Radio Company" filed with respect to the above-referenced proceeding.

Should any questions arise with respect to this matter, please communicate directly with this office.

Respectfully submitted,

Richard Becker

Richard S. Becker
Attorney for Tri-State Radio Company

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

COMMENTS OF TRI-STATE RADIO COMPANY

Respectfully submitted,

TRI-STATE RADIO COMPANY

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Its Attorneys

Date: November 10, 1993

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SUMMARY

Tri-State Radio Company ("Tri-State") submits these Comments in response to proposed Commission regulations implementing provisions of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which amended the Communications Act of 1934, as amended, to give the Commission explicit authority to use competitive bidding to award licenses for use of radio spectrum. Tri-State generally supports the Commission's proposals, but Tri-State believes that the proposals should be modified to more accurately reflect Congressional intent and the realities of the telecommunications marketplace with respect to the following two issues: (1) whether the proposed definition of small businesses for purposes of determining eligibility for preferential treatment in several aspects of the competitive bidding process, including the initial use of competitive bidding to assign broadband Personal Communications Services ("PCS") licenses, should be modified; and (2) whether steps proposed by the Commission to encourage small businesses to compete in the proposed auction process should be expanded.

Tri-State is a communications company primarily engaged in the provision of one-way paging services in numerous states. It is one of the top 15 paging companies in the country and its principals have extensive experience in the communications industry. The proposed competitive bidding procedures will affect Tri-State both in its provision of one-way paging services and in its intent to pursue PCS authorization. As a front-line participant in the telecommunications industry, Tri-State believes that it is particularly qualified to provide insight to the Commission in crafting competitive bidding procedures.

In order to more accurately carry out both the express provisions of the Budget Act and the legislative intent behind those provisions, the Commission should modify the proposed definition of small businesses to: (1) change the first proposed test from a \$6.0 million net worth/\$2.0 million average annual net income standard to a \$50 million net worth/\$5.0 million average annual operating cash flow standard; and (2) modify the second proposed test from 1,500 employees or less to 200 employees or less. These changes to the definition of small businesses are necessary: (1) based on the capital-intensive nature of the telecommunications industry; (2) to avoid effectively shutting out of competitive bidding independently-owned and non-dominant firms that would be too large to take advantage of preferential treatment for small businesses under the currently proposed standards but too small to successfully bid against mammoth local exchange carriers, cellular carriers, cable television companies and dominant interexchange carriers; and (3) to continue to prevent large firms from enjoying the preferential treatment intended by Congress for small businesses.

Tri-State firmly supports the Commission's use of regulatory set-asides for licensing of small businesses and other groups identified in the Budget Act ("Designated Entities"). Tri-State specifically supports the Commission's proposal to set aside 20 MHz Block C and 10 MHz Block D for broadband PCS licensing on a Basic Trading Area ("BTA") basis. However, Tri-State believes: (1) that the broadband PCS set-aside should be increased at least to include a 30 MHz block of PCS spectrum to be licensed on a Major Trading Area ("MTA") basis; and (2) a regulation should be adopted making clear that future frequency allocation schemes will utilize set-asides for Designated Entities wherever possible.

Additional steps proposed by the Commission to support small businesses, such as installment payments with interest, tax certificates, financial certification procedures, bidding credits and distress sales, should be adopted with the following two caveats: (1) a small business applicant should be able to take advantage of these steps whether it is bidding for spectrum set aside for Designated Entities or other spectrum; and (2) given the current status of judicial precedent, Congress's goals of promoting the economic interests of women and minority groups might best be served by relying on classification as a small business, rather than on race- or gender-conscious preferential measures.

The Commission should reduce or eliminate the proposed upfront payment and deposit requirements for Designated Entity bidders. In light of other provisions already in place, this change will not adversely affect the Commission's attempt to limit bidding to serious, qualified bidders and to minimize the possibility that licenses cannot be awarded to auction winners.

Finally, small businesses must be able to form consortia and bid in combination with other entities without losing their status as a Designated Entity. In order to address concerns regarding potential abuse of consortia bidding by entities not qualified as Designated Entities, the Commission might consider requiring that the Designated Entity hold and retain de jure and de facto control of any facility licensed as a result of preferential treatment afforded based on Designated Entity status.

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In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

COMMENTS OF TRI-STATE RADIO COMPANY

Tri-State Radio Company ("Tri-State"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits these Comments in response to the Notice of Proposed Rulemaking, 58 Fed. Reg. 53489 (October 15, 1993) ("NPRM") issued by the Commission on October 12, 1993, in the above-captioned proceeding. In the NPRM, the Commission proposed to implement provisions of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),¹ which amended the Communications Act of 1934, as amended (the "Act"), to give the Commission explicit authority to use competitive bidding to award licenses for use of the radio spectrum. These Comments by Tri-State focus on the following two issues addressed in the NPRM: (1) whether the proposed definition of small businesses for purposes of determining eligibility for preferential treatment in several aspects of the competitive bidding process, including the initial use of competitive bidding

¹Pub. L. No. 103-66, Title VI, 107 Stat. 312 (1993).

to assign broadband Personal Communications Services ("PCS") licenses,² should be modified to more accurately reflect the requirements of the telecommunications industry; and (2) whether steps proposed by the Commission to encourage small businesses to compete in the proposed auction process should be expanded.

I. The Interest of Tri-State

1. Tri-State is a communications company primarily engaged in the provision of one-way paging services in numerous states, including New York, Connecticut, New Jersey, Pennsylvania, Massachusetts, Texas, New Mexico, Arizona, Nevada and California. Tri-State provides one-way paging service on both a common carrier basis pursuant to Part 22 of the Commission's Rules and on a private carrier basis pursuant to Part 90 of the Commission's Rules. At present, Tri-State is one of the top fifteen (15) paging companies in the country. The success of Tri-State can largely be attributed to the extensive experience and abilities of the principals of Tri-State, who have more than 50 years experience in the communications industry. In addition to its one-way paging services, Tri-State is also interested in pursuing authorization for PCS systems. As an existing and experienced communications carrier, Tri-State believes that it is in an excellent position to

²In its First Report and Order, Gen. Docket No. 90-314, 8 FCC Rcd 7162 (1993), the Commission adopted rules for licensing narrowband PCS services in the 900 MHz frequency band. In its Second Report and Order, Gen. Docket No. 90-314, FCC 93-451 (released October 22, 1993) (hereinafter "Second PCS R&O"), the Commission adopted rules for licensing broadband PCS services in the 2 GHz frequency band. In the NPRM, the Commission proposed to use competitive bidding to license all PCS systems.

make maximum efficient use of spectrum recently allocated by the Commission for provision of PCS service to the public.

2. Tri-State will be directly affected by the competitive bidding procedures proposed in the NPRM in several ways, including: (1) Tri-State's one-way paging operations will be subject to the competitive bidding procedures proposed in the NPRM; and (2) the final rules regarding competitive bidding will have a direct impact on Tri-State's participation in the PCS licensing process. Although Tri-State generally supports the proposals specified in the NPRM to implement competitive bidding authority granted to the Commission in the Budget Act, Tri-State believes that certain of those proposals should be modified to more accurately reflect both Congressional intent and the realities of the telecommunications marketplace. As a front-line participant in the constantly changing telecommunications industry, Tri-State is particularly qualified to provide insight to the Commission in its attempt to craft competitive bidding procedures.

II. Provisions Implementing the Budget Act Regarding Small Businesses Must Be Modified

A. Overview

3. Although the general purpose of the amendments to the Act adopted in the Budget Act is to improve licensing and spectrum allocation by the Commission, the text of the Budget Act plainly contemplates certain safeguards to further the economic opportunities of the following types of applicants: small businesses; rural telephone companies; and business owned by members of minority groups and women. Specifically, Section

309(j)(3) of the Act directs the Commission to design competitive bidding procedures to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants.³ Similarly, Section 309(j)(4)(C) of the Act provides that in prescribing area designations and bandwidth assignments, the Commission should promote economic opportunity for a wide variety of applicants.⁴ In Section 309(j)(4)(D) of the Act, Congress expressly required that the Commission consider use of specified procedures to ensure that certain groups are given the opportunity to participate in the provision of spectrum-based services.⁵ In each of these statutory provisions, Congress identified small businesses, rural telephone companies and businesses owned by members of minority groups and women as groups of applicants to be considered in adopting competitive bidding procedures.⁶ The legislative history of the Budget Act confirms that Congress's objective in adopting these provisions was to promote economic opportunity for the Designated Entities and to avoid a significant increase in concentration in the telecommunications industry.⁷

4. The plain language of the Budget Act and clear

³47 U.S.C. §309(j)(3).

⁴47 U.S.C. §309(j)(4)(C).

⁵47 U.S.C. §309(j)(4)(D).

⁶47 U.S.C. §§309(j)(3), 309(j)(4)(C), 309(j)(4)(D). These entities will be referred to collectively hereinafter as "Designated Entities."

⁷See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., 254, 255 (1993); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., 482-484 (1993).

legislative intent demonstrate incontrovertibly that Congress intended the Commission to craft competitive bidding procedures to provide maximum opportunity for participation by the Designated Entities, including small businesses. Although the NPRM did include certain proposals in this regard, Tri-State respectfully submits that the Commission did not go far enough to fulfill its statutory mandate. Tri-State is particularly interested in the proposals as they affect small businesses and Tri-State believes that the Commission should modify the proposals specified in the NPRM as set forth below to more accurately reflect both Congressional intent and the realities of the telecommunications marketplace.

B. Definition of Small Business

5. In the NPRM, the Commission proposed certain eligibility criteria in order for an applicant to be considered a small business entitled to preferential treatment in the competitive bidding process.⁸ Specifically, the Commission proposed to rely on the definition devised by the Small Business Administration ("SBA"), as recommended in a report ("SBAC Report") submitted by the FCC Small Business Advisory Committee ("SBAC") on September 15, 1993, in the Gen. Docket 90-314 PCS rulemaking proceeding.⁹

6. In the SBAC Report, the SBAC pointed out that under SBA regulations, an applicant can qualify as a small business in one of two ways: (1) together with its affiliates an applicant does not

⁸NPRM, ¶77.

⁹Id. at n.51.

have net worth in excess of \$6.0 million, and does not have average net income after Federal income taxes (excluding carry-over losses) for the preceding two years in excess of \$2.0 million;¹⁰ or (2) together with its affiliates an applicant meets a size standard for its industry, which, in the case of the radio telecommunications industry is defined by the SBA as 1,500 employees or less.¹¹ Although these standards may make sense in the context of provision of financial, management and/or technical assistance by the SBA, Tri-State respectfully submits that these standards do not accurately reflect the realities of the telecommunications marketplace, particularly with respect to PCS.¹²

7. With respect to the first test for small business eligibility, Tri-State believes that: (1) the \$6.0 million net worth standard is far too low; and (2) the \$2.0 million average annual net income test should be replaced with a \$5 million average

¹⁰See 13 C.F.R. §121.802(a)(2)(1).

¹¹See 13 C.F.R. §1.802(a)(2)(ii), 13 C.F.R. §1.601 (SIC 4812).

¹²SBA guidelines also contain a provision for waiver whereby applicable thresholds are increased by 25% whenever an applicant agrees to use the SBA's assistance within a "labor surplus area" or a "redevelopment area." See 13 C.F.R. §1.802(d). The Commission did not specifically discuss this waiver provision when addressing the definition of small businesses, even though the SBAC included this provision in the SBAC Report. NPRM at ¶77, n.51. It is unclear if and how this waiver provision could apply in the communications context given the broad geographic coverage of many of the communications systems that would be subject to competitive bidding, particularly including PCS. Accordingly, Tri-State questions whether this waiver provision can be included in the proposed competitive bidding rules. In any event, the Commission must address this issue when it adopts final eligibility criteria for small businesses.

annual operating cash flow test.¹³ With respect to net worth, as the Commission and the SBAC recognized,¹⁴ the telecommunications industry is capital-intensive, requiring licensees to initially expend substantial assets to plan, construct and commence operation of communications systems. This is particularly true of large systems (covering large areas of the country and/or using large blocks of radio spectrum) licensed in several of the radio services to be subject to competitive bidding under the NPRM, including PCS. In order to make these initial capital investments, applicants for new systems must generally have significant internal resources to both obtain necessary financing and to ensure ability to construct and operate systems for several years at a loss until sufficient subscriber revenue can be generated to achieve profitability. The \$6.0 million SBA net worth standard is far too low to accommodate this attribute of the telecommunications industry. In point of fact, if adopted, this standard would preclude from consideration as small businesses many independently-owned and non-dominant firms with the wherewithal to construct the proposed systems. As a result, these firms would be effectively shut out of competition for new radio spectrum because: (1) they would be too large to take advantage of the preferential treatment Congress clearly intended to afford to small businesses; but (2) they would be too small to successfully bid against mammoth local exchange carriers,

¹³Operating cash flow equals earnings before interest, depreciation, taxes and amortization.

¹⁴SBAC Report, p.20-21; NPRM at n.51.

cellular carriers, cable television companies and dominant interexchange carriers. By effectively preventing these independently-owned and non-dominant firms from participating in the competitive bidding process, the Commission would be denying the public the extensive innovation, entrepreneurial spirit and technical expertise that these firms bring to the telecommunications marketplace.

8. To avoid this problem, Tri-State respectfully submits that a more realistic net worth standard would be \$50 million or less. Given the capital-intensive nature of the telecommunications industry and the fact that installation of large new systems (such as broadband PCS systems) may cost from \$50-100 million, Tri-State believes that a \$50 million net worth standard would more properly define small businesses consistent with the legislative intent behind the Budget Act.

9. With respect to the \$2.0 million net income standard that is included as the second part of the first test for small businesses in SBA regulations, Tri-State believes that a more useful standard for defining small businesses would be averaging the operating cash flow of an applicant over the preceding two-year period currently specified in SBA regulations. Many huge corporations can show little or no income after Federal taxes. As a result, the proposed SBA annual net income test does not effectively exclude these corporations from the definition of small businesses. Tri-State respectfully submits that a more accurate way to define small businesses would be to analyze an applicant's

annual operating cash flow. This test provides a clearer picture of the overall size, volume and extent of an applicant's business and prevents large firms from circumventing this limit by accounting maneuvers that limit net income. Tri-State recommends a standard of \$5 million or less average annual operating cash flow for the two preceding years as a standard that, when coupled with a \$50 million net worth standard, accurately defines small businesses in the telecommunications marketplace.

10. With respect to the second test for small businesses set forth in SBA regulations, Tri-State believes that 1,500 employees is far too many for an applicant to be considered small. As set forth above, the telecommunications industry is capital-intensive, not labor-intensive. This is particularly true with respect to wireless communications, where use of radio spectrum (as opposed to hard wire) and constant technological improvements allow operators to provide service with relatively small numbers of employees. Accordingly, Tri-State believes that the SBA's 1,500 or less employee standard is too high. Tri-State respectfully submits that a more realistic alternative definition of small businesses in the wireless telecommunications industry is 200 or fewer employees.

11. In sum, Tri-State believes that the Commission should adopt a definition of small businesses different than the one specified in SBA regulations. Tri-State submits that an applicant should qualify as a small business entitled to preferential treatment under the Budget Act if: (1) it has a net worth of \$50 million or less and has an average annual operating cash flow for

the two preceding years not in excess of \$5 million; or (2) it has 200 or fewer employees. Tri-State maintains that these standards more accurately define small businesses in the wireless telecommunications industry.¹⁵

C. Broadband PCS Spectrum Set-Aside

12. In its NPRM, the Commission proposed several steps to encourage participation by Designated Entities in the competitive bidding process. Perhaps the most effective of these measures was the set-aside of two blocks of broadband PCS spectrum nationwide that would be subject to bidding only by Designated Entities.¹⁶ Specifically, the Commission proposed to set aside one 20 MHz frequency block (Block C) and one 10 MHz frequency block (Block D) for bidding by Designated Entities. Both of these blocks are to be licensed on a Basic Trading Area ("BTA") basis pursuant to the licensing scheme adopted by the Commission in its Second PCS R&O.

13. Tri-State firmly supports the Commission's use of regulatory set-asides for licensing by Designated Entities. Unlike

¹⁵Although not referenced in the NPRM, in the SBAC Report, the SBAC raised questions regarding the Commission's ability to define standards for small businesses different than those adopted by the SBA in light of the Small Business Credit and Business Opportunity Enhancement Act of 1992 ("1992 SBA Amendments"). SBAC Report at 21. As noted by the SBAC, however, the 1992 SBA Amendments do not "impair the ability of an agency to implement small business size standards without obtaining SBA's concurrence in response to a specific statutory direction or a general legislative authorization to prescribe small business size standards." Id. Although this issue should be specifically addressed by the Commission in its ultimate decision on this matter, Tri-State believes that the Budget Act constitutes a specific statutory direction that would justify adoption of small business size standards different than those used by the SBA.

¹⁶NPRM at ¶121.

other measures specified by Congress in the Budget Act or proposed by the Commission in the NPRM, only set-asides will ensure that a Designated Entity will become licensed in a given radio service. Although other measures, such as installment payment plans, tax certificates and bidder's preferences, may help Designated Entities compete in bidding against communications behemoths with almost unlimited financial resources, it is only by setting aside spectrum for Designated Entities, including small businesses, that the Commission can meet the statutory requirement to "ensure that [Designated Entities] are given the opportunity to participate in the provision of spectrum-based services."¹⁷ Set-asides are particularly important in the licensing of services such as PCS, where substantial amounts of spectrum are allocated to new radio services that have generated extensive industry expectation and speculation. With financial stakes so high, the threat of excessive concentration of licenses in the hands of a very few large communications entities becomes almost overwhelming. Only by taking firm regulatory steps such as set-asides can the Commission hope to meet Congress' command to ensure participation by Designated Entities.

14. Accordingly, Tri-State emphatically supports the Commission's proposal to set aside broadband PCS spectrum for licensing by Designated Entities. Tri-State respectfully submits, however, that the Commission should go even further than proposed in the NPRM by: (1) setting aside additional broadband PCS

¹⁷47 U.S.C. §309(j)(4)(D).

spectrum for licensing by Designated Entities; and (2) adopting a regulation making clear that in licensing any new radio services by competitive bidding in the future, the Commission will, where possible, set aside spectrum for licensing by Designated Entities.

15. With respect to Tri-State's first proposed modification, there are many possibilities as to how the Commission can increase the Designated Entity PCS set-aside within the allocation structure adopted in the Second PCS R&O. At a minimum, however, Tri-State submits that one of the 30 MHz blocks of PCS spectrum to be licensed on a Major Trading Area ("MTA") basis be included in the set-aside. The Commission's current set aside of only BTA-based PCS spectrum effectively precludes Designated Entities from any hope of providing nationwide PCS service. Limitation to 10 and 20 MHz blocks also raises questions as to the economic viability of systems which Designated Entities can be assured of receiving.¹⁸ In short, the Commission's current set-aside proposal appears to relegate Designated Entities to lower-quality PCS systems whose economic value will most likely be less than other PCS systems. Tri-State respectfully submits that this "poor stepsister" role for Designated Entities is not consistent with the explicit language of the Budget Act or the legislative history of the Budget Act, both of which unequivocally require participation by a wide variety of applicants, including Designated Entities, and avoiding excessive concentration of licenses.

¹⁸See, e.g., Separate Statement by Commissioner Andrew C. Barrett included with the NPRM ("Barrett Statement"), p.2-3.

16. Accordingly, the Commission should modify its proposed PCS set-aside to include additional spectrum, at least incorporating a 30 MHz frequency block to be assigned on an MTA basis. In addition, to ensure the continued use of set-asides as the most effective regulatory means of complying with statutory requirements to ensure participation by Designated Entities, Tri-State respectfully submits that the Commission should adopt a regulation making clear that future frequency allocation schemes will utilize set-asides for Designated Entities wherever possible.

D. Additional Measures Supporting Small Businesses

17. Aside from the broadband PCS spectrum set-aside, in its NPRM, the Commission proposed additional measures to assist small businesses and other Designated Entities in participating in competitive bidding.¹⁹ These steps were proposed consistent with recommendations made by the SBAC in the SBAC Report and included installment payments with interest and tax certificates.²⁰ In point of fact, the SBAC Report proposed additional preferential steps to be afforded to Designated Entities, including financial certification procedures, bidding credits and distress sales.²¹

18. Tri-State supports adoption of the steps proposed by the Commission and the SBAC to meet Congressionally-mandated economic opportunity objectives, while at the same time avoiding undue concentration of ownership. Tri-State respectfully submits,

¹⁹NPRM at ¶¶74-76, 79-80.

²⁰Id. at ¶¶79-80.

²¹SBAC Report at 12-19.

however, that these steps should be applied subject to the following two caveats regarding small businesses. First, Tri-State believes that an eligible small business applicant should be able to take advantage of these preferential steps when bidding on all spectrum licensed pursuant to competitive bidding. Accordingly, in the PCS context, a small business should be able to rely on installment payments, bidding credits, tax certificates, and distress sales regardless of whether it is bidding on set-aside PCS Blocks C and D or on other PCS spectrum. Tri-State respectfully submits that the intended goals of these preferential procedures apply regardless of whether a small business applicant is bidding for spectrum set aside for Designated Entity use.

19. Second, in the NPRM, the Commission noted the significant difficulties imposed by relevant judicial precedent in implementing race- or gender-conscious preferential measures as envisioned in the Budget Act.²² The Commission suggested that one way of avoiding these difficulties would be to afford preferences solely to small businesses and to promote economic opportunity for women and minorities through their ownership of small businesses.²³ Although Tri-State recognizes the importance of including women and minorities in the telecommunications industry, Tri-State believes that this goal might best be served by relying on classification as a small business to ensure participation by these groups. This economic-based approach avoids what could be extensive, lengthy

²²NPRM at ¶73-74.

²³Id. at ¶74.

legal and perhaps constitutional challenges to the Commission's proposed competitive bidding process, while at the same time ensuring that women and minorities owning small businesses can participate in spectrum-based opportunities.

E. Upfront Payments

20. In the NPRM, the Commission proposed to require "upfront payments" before an entity would be permitted to bid on available spectrum.²⁴ The Commission also proposed to require that successful bidders increase any upfront payment to equal 20% of the successful bid.²⁵ The Commission proposed these requirements to "limit bidding to serious qualified bidders, and to minimize the probability that, after the auction is over (and the participants have dispersed), the Commission finds that it cannot award a license to the auction winner."²⁶ Although not specifically addressed by the Commission, it appears that these requirements apply regardless of whether an applicant is a Designated Entity.

21. Tri-State respectfully submits that in order to fully implement the statutory mandate of the Budget Act, the Commission should modify its upfront payment and deposit requirements as they apply to Designated Entities. Specifically, Tri-State suggests either elimination of those requirements or substantial reduction of those requirements for Designated Entity bidders. Tri-State recognizes the Commission's need to ensure that bidders are serious

²⁴Id. at ¶¶102-103.

²⁵Id. at ¶¶103-106.

²⁶Id. at ¶102.

and that the highest bidders are actually licensed for and construct the authorized systems. However, excessive upfront payments and deposits could significantly hinder the ability of small businesses to participate in competitive bidding.²⁷ While an \$8 million upfront payment for a 20 MHz broadband PCS license (like the Block C PCS license set aside for Designated Entities) in a market of 20 million may not be excessive for mammoth local exchange carriers, cellular companies, cable television companies or interexchange carriers, that magnitude of an upfront payment would effectively preclude many small businesses from participating in competitive bidding.

22. It must also be emphasized that other requirements proposed in the NPRM minimize the risk of insincere small business bidders or small business high bidders who cannot be granted licenses. First, many radio services, including PCS, include stringent financial qualifications standards. Small businesses, as well as other applicants, would still be required to meet these standards, even if upfront payments and deposits were eliminated for Designated Entities. Second, even in a competitive bidding context, small businesses would incur significant legal, engineering and other expenses in the planning, preparation, and filing of applications with the Commission. These expenses are in addition to any upfront payment or deposit and at least for small

²⁷This is particularly true if the Commission adopts its proposal that upfront payments and deposits by high bidders are subject to forfeiture in the event that an auction winner is found ineligible or unqualified or is unable to pay the balance of its bid at the appropriate time. Id. at ¶109.

businesses, these expenses constitute an important deterrent to small business applicants that are either not sincere or not qualified to become licensed. Finally, proposed antitrafficking restrictions that would apply to Designated Entities awarded licenses based on their Designated Entity status²⁸ take away any economic incentive by an unserious or unqualified small business bidder, who might otherwise have attempted to make a profit by prompt resale of any authorization awarded to it.

23. For all of these reasons, Tri-State respectfully submits that the proposed upfront payment and deposit requirements should be eliminated, or at least substantially reduced, as they apply to Designated Entities.

F. Small Businesses Bidding Through Consortia

24. In considering how to implement the Budget Act's directives to ensure participation by Designated Entities, the Commission noted its concern that if Designated Entities are allowed to engage in group bidding via consortia, some entities not eligible as Designated Entities might be able to take advantage of special treatment by using a Designated Entity as a "front."²⁹ In response to this concern, Tri-State must emphasize that it is vitally important that small businesses be permitted to form consortia and bid in combination with other entities without losing their status as a Designated Entity. In some circumstances, small

²⁸See id. at ¶¶83-89.

²⁹Id. at ¶78. This concern was more specifically expressed in the Barrett Statement at p.1-2.

businesses may decide to bid on a specific license individually. This would most likely occur with relatively small systems that could readily be constructed and operated by the small business. However, in considering bidding for large blocks of radio spectrum or for systems that cover extensive geographic areas, small businesses must be allowed to retain flexibility to enter into agreements with other small businesses and additional parties to structure a business plan that permits the combined entity to both: (1) submit a winning bid for the proposed large system; and (2) construct and operate that system for service to the public as quickly and efficiently as possible. Only by allowing small businesses to enter into consortia with other entities, particularly including financial institutions that could assist the applicant in financing the proposed service offering and meeting any applicable Commission financial requirements, can the Commission ensure that small businesses have the opportunity to take full advantage of available spectrum.

25. In this regard, and in light of Commissioner Barrett's clear concern over potential abuse, a compromise that might be adopted is a requirement that the Designated Entity hold and retain de jure and de facto control³⁰ of any facility licensed as a result of preferential treatment afforded based on Designated Entity status. This compromise would allow small businesses to maintain

³⁰As defined by applicable Commission regulation and precedent regarding the application of Section 310(d) of the Act, 47 U.S.C. §310(d), requiring Commission consent to transfer of control or assignment of radio licenses.

the flexibility they require to enter into consortia for bidding and operational purposes, while at the same time ensuring that any license issued pursuant to preferential measures is held by an entity controlled by a Designated Entity.

G. Summary

26. In sum, Tri-State supports the Commission's attempt to craft competitive bidding rules that promote statutory requirements to assist Designated Entities, including small businesses. The proposals set forth in the NPRM should, however, be modified to: (1) revise the definition of small businesses to more accurately reflect the requirements of the telecommunications industry; and (2) expand the steps proposed by the Commission to encourage small businesses to compete in the proposed auction process.


III. Conclusion

27. The competitive bidding proposals specified by the Commission in the NPRM in response to the changes to the Act adopted in the Budget Act are critically important to all aspects of the communications industry. Applicants for new services, such as PCS, and companies providing existing services, such as one-way paging carriers, are all affected by the important statutory and regulatory changes adopted in and pursuant to the Budget Act. Tri-State generally supports the proposals specified in the NPRM to implement competitive bidding authority granted to the Commission in the Budget Act, except with respect to the following issues: (1) the proposed definition of small businesses for purposes of determining eligibility for preferential treatment in several

aspects of the competitive bidding process should be modified to more accurately reflect the requirements of the telecommunications industry; and (2) steps proposed by the Commission to encourage small businesses to compete in the proposed auction process should be expanded.

Respectfully submitted,

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